EXPERIMENTAL EDITION

CASES AND MATERIALS ON THE LAW OF TORTS

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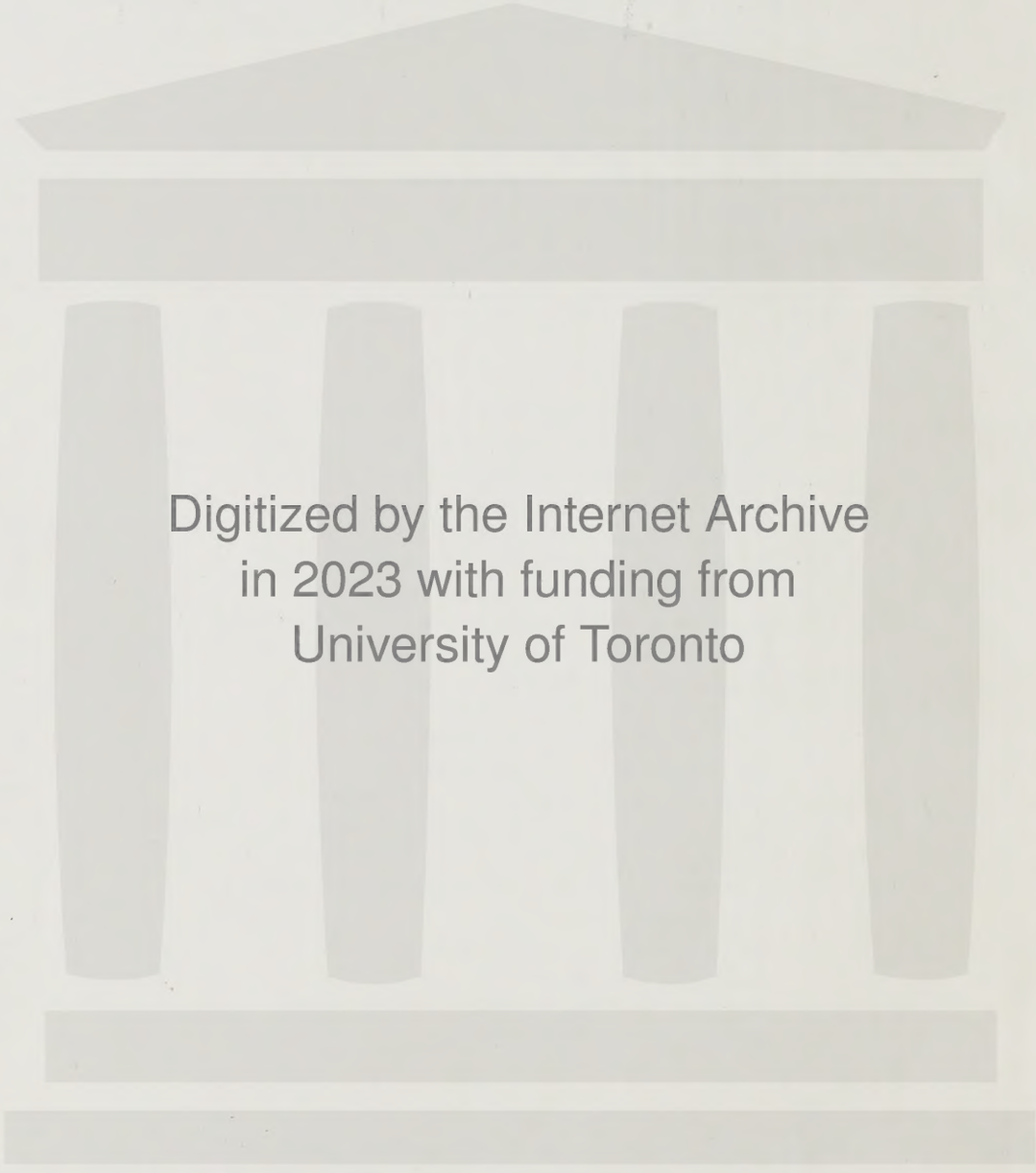

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Section 1

The Nature and Purpose of the Law of Torts

The recognition of the Law of Torts as a sufficiently singular body of law to merit identification by a rubric and segregated consideration in a legal treatise goes back only to about 1860 when an Englishman and an American published books on the subject. The word "tort", of course, was to be found both in English and French long before, and in both languages it meant "wrong". It had equivalents in Spanish and Italian and derived from the Latin "tortus", meaning "twisted" or "wrung". And, rubrics aside, the kind of problem with which this branch of the law concerns itself has been around as long as people have lived together in society, and has called for, and received, legal attention.

Wherever people live together in society the activities of some invade the interests of others and cause harm, sometimes intentionally, sometimes negligently, sometimes quite by accident. In England, let us say about the year 1066, the harm tended to be inflicted in fairly straight-forward fashion upon fairly tangible interests. People struck each other, or threatened to, spoke ill of each other, went on each other's land, and seized possession of or damaged horses and cows, pigs and sheep and various items of inanimate personal property as well. To preserve the King's Peace and prevent aggrieved individuals from relying on self-help (or going without a remedy altogether) the Norman, and especially the Angevin kings sent judges about the country to settle disputes peaceably. In other words, to apply to them a Law of Torts, nameless though it still might be.

These royal courts were not, of course, the first courts in England to deal with such problems. Indeed the history books all say that the royal courts wrested jurisdiction away from local courts, to the disgruntlement of the barons who included the issue in the Magna Carta, in the long run to no avail. But that is another story. The point here of concern is that the royal courts were the first courts developing and applying a law common to all England, thereby giving birth to the title by which the English system of law became known. Prior to the Conquest there simply never had been a central government strong enough to construct such a centralizing and homogenizing institution.

Centuries later the Common Law system spread round the world with English settlers and colonists and it continues to prevail in the Anglophone provinces of Canada, the English-speaking countries including the United States of America, and numerous other present and former parts of the British Empire and Commonwealth. So the activity of the royal courts in post-Conquest England constituted the genesis of our Law of Torts, albeit the present generation may show scant family resemblance to its distant progenitor.

It is perhaps needless to say that the royal courts were concerned with settling disputes other than those arising out of the injuries inflicted on some by the activities of others. Those other disputes do not concern us much in this course, however, and so our focus is almost exclusively on the injuries, the kind of conduct causing them and what the courts have done about it all because this is a field where the law is mostly judge-made.

Down through the centuries as society developed and grew more complex, the opportunities for harmful contact increased, the activities capable of causing harm waxed more numerous and the interests open to be invaded became more diverse and not quite so corporeal. The Law of Torts developed more or less apace. It fell to the industrial revolution of the 18th and 19th centuries, however, to do for the Law of Torts what Henry Ford did for the automobile: bring it into the big time. It generated new interests and created opportunities and instrumentalities for invading them by bringing more people into the close contact of urban life, putting them to work in factories with machines, sending them travelling on new roads and new rails, encouraging them to compete for business in the mushrooming field of commerce. It remained for the 20th century to develop the most destructive activity yet, motoring, and to add to it, the radio, television, the aeroplane, the computer and various kinds of looking and listening devices. In the course of it all, in addition to interests in physical integrity, honour and tangible property already mentioned the law has come to recognize as worthy of protection interests in emotional tranquility, family relations and various forms of economic and commercial relations and prospects. Neither the list of activities causing harm nor the list of interests which the law will protect is closed.

In early times, compensation to the injured individual and penalties to the Crown might figure as remedies in the same court proceedings. In other words, not only was there no well-defined Law of Torts, there was not even a clear-cut distinction between criminal and civil law. But the first treatise on the common law, published in 1187 and attributed to Ranulf de Glanvill, remarked that "some pleas are criminal, and some are civil". Lord Mansfield in Atcheson v. Everitt, (1755) 1 Cowp. 382 at 391 said "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions." And Winfield in his treatise the Province of the Law of Tort, in 1931, indicated (p. 201) that "Tort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages."

So now we can say the criminal law proscribes anti-social behaviour under penalty of fine or imprisonment. The Law of Torts concerns itself only with reparation to the individual for the harm done.

Or is it that simple? Consider the following cases.

Section 2: The Origin of the Law of Torts; Herein of the Forms of Action

> So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.
>
> Maine, Early Law and Custom, (1883)

Many conflicts which fall within the province of the Law of Torts (and other branches of the law for that matter) are settled by agreement between the parties. Where a person who has suffered damage agrees to a certain sum by way of compensation, to accept a promise that something-or-other will not be done any more, to forgive and forget, or where an individual who has inflicted damage agrees to pay up, to cease and desist, to say he is sorry, the agreement may or may not be based on a keen regard for the true facts and the strict legal position. Many other factors can have a bearing on decisions of this sort; whether or not one has a well-developed sense of outrage, how badly and how quickly one might need the money, whether or not one wants to go to the expense and trouble of a lawsuit, how sure one could be of winning if one did, and so on. But when a conflict within the province of the Law of Torts is not settled by agreement than it normally falls to be resolved by a court and a court must try as hard as it can to find the true facts (what really happened between the parties to give rise to the conflict) and must apply the appropriate law to those facts (decide in accordance with the prevailing theory of liability whether the damager must compensate the damaged).

The procedure by which a dispute is brought before a court to have the facts determined and the law applied is called an action. The form an action is required to take is pretty well standard even though the facts and the relevant law may vary greatly. Commonly a writ is issued out of the court office, at the instance of the party seeking redress, directing the other party to defend the case or suffer the consequences. Pleadings and various discovery procedures help inform each side concerning the case which will be presented by the other, and eventually the matter comes to trial before the court (a judge, or a judge and jury). The emphasis is, or is intended to be, on getting at the facts as economically and expeditiously as possible so that the proper law may be selected and applied. This is, however, a relatively modern procedural achievement.

Until the late 19th century the form that an action took varied considerably according to the nature of the claim being prosecuted. And in early times, the form of the action seems to have been more important than the facts of the case or the law to be applied. This historical verity had a considerable bearing on the growth of a theory, or theories, of liability, and even into the 20th century it has had a strong impact on the way the courts think about and apply theories. So by way of background to Chapter II, which will deal with the growth of the fault theory, we must try to understand a bit about the forms of action at Common Law.

CHAPTER VI

CAUSATION: A MATTER OF FACT OR A MATTER OF LAW?

The statement that the defendant in a case did not "cause" the plaintiff's injury and therefore ought not to be required to compensate him for it seems simple and straight-forward enough. Through the magic of the common law, however, it has been rendered both complex and deceptive.

It is a story with which you will be familiar. The same language is used to express two quite distinct ideas. To say that the defendant in a case did not "cause" the plaintiff's injury may mean that what the defendant did was of no significance in bringing about the damage. That is a meaning you would have anticipated. But it may meant that, notwithstanding the defendant's conduct was a factor in bringing about the injury, defendant ought not to be held legally responsible because the conduct does not seem blameworthy or, there was other conduct contributing to the injury which seems more blameworthy. That is a meaning which you might not have anticipated.

Why would the same language be used to express these two ideas? The problem is that the concepts, though distinct, are related. Conduct causes harm. Negligence describes conduct of a certain type. Since only conduct of this type results in liability there is a tendency to skip a stage in the reasoning. Instead of asking whether the plaintiff's harm was caused by the defendant's conduct and then proceeding to ask whether the conduct could be considered negligent, the tendency is to ask whether the plaintiff's harm was caused by the defendant's negligence. Once one thinks in terms of <u>negligence</u> "causing" harm it is easy to equate the absence of negligence with the absence of cause. And this is what courts and counsel (not necessarily in that order) have done countless times and will probably continue to do as long as negligence remains the principal theory of liability. In a word, then, the same language is used to express two ideas because frequently there has been a failure to realize that they <u>were</u> two ideas.

In some of the more scholarly judgments and some of the scholarly writing the two concepts are distinguished by the labels "cause in fact" and "legal cause". But while this indicates that the particular judges and the particular scholars have not been confused, it does not really suggest workable terminology for general use because the labels are sufficiently congruent to contain the seeds of continuing confusion.

The cases in this chapter illustrate the two, concepts in a variety of forms, as well as the confusion.

CHAPTER VII

AN ANATOMY OF NEGLIGENCE: RISK TO WHOM? AND RISK OF WHAT?

In Chapter V we saw that negligence involves the creation of unreasonable risks of harm. And we saw that, lunatics and children aside, in determining whether a particular defendant was negligent, i.e., had created unreasonable risks of harm, the court applies a more or less objective test: it compares what the defendant did with what a reasonable man would have done in the same circumstances.

The basic problem in negligence litigation is one of limitation of liability. As Fleming says (Law of Torts, 4th ed. 1971, at p. 104): "Some interests are protected against negligent interference, others are not. It would be inconceivable in our present stage of civilization to contemplate holding a person liable for all kinds of harm caused to anyone by conduct fraught with risk of some injury. Negligence is a matter of risk, i.e., of recognizable danger of harm. This immediately raises the question 'Risk to whom?' and 'Risk of what?' For the purpose of dealing with these questions, the courts have evolved a number of artificial techniques, like 'duty of care' and 'remoteness of damage', which are concerned with the basic problems of what harms are included within the scope of the unreasonable risk created by the defendant, and what interests the law deems worthy of protection against negligent interference in consonance with current notions of policy. Since the definition of tortious negligence does not furnish any clue to its conditions of actionability beyond a mere reference to the nature of the defendant's conduct, these ancillary mechanisms assume a vital importance in delimiting the scope of legal protection against inadvertent harm.".

In this chapter we will examine these artificial techniques for limiting liability in negligence. They do not themselves furnish reasons for particular results. They merely furnish ways of stating results. When the courts are dealing with the question of 'Risk to whom?' they normally talk 'duty of care'. When they are dealing with the question of 'Risk of what?' they normally talk 'remoteness of damage' or 'proximate cause'. (In the last chapter we saw the confusion that can arise between 'legal or proximate causation' on the one hand, and 'factual causation' on the other. There are aspects of this confusion in some of the cases in this chapter.)

Since negligence is a matter of risk--of recognizable danger of harm resulting from the defendant's conduct--reasonable foreseeability of harm plays an important role in deciding whether the defendant was negligent. Not determinative, because the risk, although foreseeable, may be very small (Bolton v. Stone, supra, p. 353), and any utility in the defendant's conduct has to be balanced against the harm risked (Priestman v. Colangelo, supra, p. 358) in deciding whether the risks were unreasonable, i.e., in deciding whether the defendant was negligent.

And reasonable foreseeability of harm also plays an important role in answering the questions of 'Risk to whom?' and 'Risk of what?'. Again not determinative, because considerations of policy may dictate a finding

of 'no duty' or 'no proximate cause' despite a finding of foreseeability of harm to a particular person or of a particular kind. And conversely, despite a finding of unforeseeability, policy may dictate a finding of 'duty' or 'proximate cause'. In recent years the courts, particularly the English courts, often have been prepared to articulate their policy considerations. And this has been especially true when the plaintiff is complaining of a negligent interference, not with his physical person or tangible property, but with an economic interest. Some of the cases towards the end of the chapter raise the distinction between tangible property and economic interests. In a later chapter we will deal with the special problem of negligent misrepresentation (normally involving words as opposed to action) and economic interests, where considerations of policy are crucial. The cases in this chapter involve negligent action, as opposed to negligent words, although in some of them there is an element of misrepresentation.

The chapter contains some of the best known, and most difficult, cases in the common law world of torts.

WINTERBOTTOM v. WRIGHT
Court of Exchequer 1842 152 E.R. 402

Case. The declaration stated, that the defendant was a contractor for the supply of mail-coaches, and had in that character contracted for hire and reward with the Postmaster-General, to provide the mail-coach for the purpose of conveying the mail-bags from Hartford, in the county of Chester, to Holyhead: That the defendant, under and by virtue of the said contract, had agreed with the said Postmaster-General that the said mail-coach should, during the said contract, be kept in a fit, proper, safe, and

secure state and condition for the said purpose, and took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of the said mail-coach; and it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail-coach in a fit, proper, safe, and secure state and condition for the purpose aforesaid: That Nathaniel Atkinson and other persons, having notice of the said contract, were under contract with the Postmaster-General to convey the said mail-coach from Hartford to Holyhead, and to supply horses and coachmen for that purpose, and also, not on any pretence whatever, to use or employ any other coach or carriage whatever than such as should be so provided, directed, and appointed by the Postmaster-General: That the plaintiff, being a mail-coachman, and thereby obtaining his livelihood, and whilst the said several contracts were in force, having notice thereof, and trusting to and confiding in the contract made between the defendant and the Postmaster-General, and believing that the said coach was in a fit, safe, secure, and proper state and condition for the purpose aforesaid, and not knowing and having no means of knowing to the contrary thereof, hired himself to the said Nathaniel Atkinson and [110] his co-contractors as mail-coachman, to drive and take the conduct of the said mail-coach, which but for the said contract of the defendant he would not have done. The declaration then averred, that the defendant so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract, and so wholly neglected and failed to perform his duty in this behalf, that heretofore, to wit, on the 8th of August, 1840, whilst the plaintiff, as such mail-coachman so hired, was driving the said mail-coach from Hartford to Holyhead, the same coach, being a mail-coach found and provided by the defendant under his said contract, and the defendant then acting under his said contract, and having the means of knowing and then well knowing all the aforesaid premises, the said mail-coach being then in a frail, weak, and infirm, and dangerous state and condition, to wit, by and through certain latent defects in the state and condition thereof, and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life. . . .

Byles, for the defendant, objected that the declaration was bad in substance. This is an action brought, not against Atkinson and his co-contractors, who were the employers of the plaintiff, but against the person employed by the Postmaster-General, and totally unconnected with them or with the plaintiff. Now it is a general rule, that [111] wherever a wrong arises merely out of the breach of a contract, which is the case on the face of this declaration, whether the form in which the action is conceived be ex contractu or ex delicto, the party who made the contract alone can sue: *Tollit* v. *Sherstone* (5 M. & W. 283). If the rule were otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences

CHAPTER VIII: PROOF OF NEGLIGENCE: RES IPSA LOQUITUR

Note on the Trial Process

A civil action is a formal procedure for settling a dispute between or among the parties. Unable to resolve their disagreement by negotiation, one of them has invoked the assistance of the Court. Generally, the assistance of the Court is sought by the party who wishes to bring about a change in the status quo. In a tort action this usually means that someone has suffered a loss and wishes the Court to change the status quo by shifting that loss to someone else through the medium of a damage award, although sometimes he may be seeking an order against the continuation of the status quo by requiring damaging conduct to be stopped.

The dispute among the parties may involve one or more of three elements. It may be as to the facts: the events that transpired involving the parties. It may be as to the law: the rule that governs the type of situation disclosed by the facts. Or it may be as to the application of the law: the way in which the governing rule should be brought to bear on the particular facts. Most cases that go to trial are primarily disputes of fact. The trial is primarily a fact-finding process. The parties seek by evidence to establish what events have transpired, and frequently, when the fact determinations have been made, the law and its application fall fairly readily into place. It is probably fair to say that only in a minority of trial cases is there a serious dispute as to the law or its application. In appellate courts the situation is reversed. Appeal courts are reluctant to interfere with trial courts on questions of fact, especially where the credibility of witnesses is involved, since there is thought to be some advantage in seeing and hearing the witnesses as they testify. On the other hand, appeal courts are more authoritative on legal questions. Consequently the only appeals really worth taking, and most appeals actually taken, involve questions of law.

This chapter is concerned with the proof of facts at a trial; facts which in the plaintiff's case disclose a cause of action, facts which in the defendant's case negate a cause of action or disclose a defence. But where one is proving facts, even though there is no dispute of law, the law plays an important role because it determines what facts are significant. In a battery case, for example, the legal definition of battery dictates that plaintiff will try to prove, and defendant will try to deny, that the latter intentionally struck the former a physical blow. Or, alternatively, the definition of self-defence will dictate that the defendant try to prove he was being attacked by the plaintiff at the moment when he intentionally struck the plaintiff and that he did it in order to protect himself. It is this nexus between law and fact that leads lawyers to talk, frequently, about "proving that there was a battery". It is a shorthand way of saying "proving facts that will bring the plaintiff's claim within the definition of a battery". Unless one understands this, the use of the shorthand can be misleading.

Lawyers often talk, too, about "proving negligence" as though negligence were a fact like any other. But this is similarly misleading. To be sure, in proving particulars of negligence, such as high speed and lack of attention in a motor vehicle case, or the failure to do a sponge count or use sponges with strings attached in a surgical malpractice case, one is proving facts. But the ultimate conclusions that these particulars constitute negligence involves a value judgment. The conduct proved to have taken place is measured against a community standard or norm - as represented by the behaviour of the "reasonable man" in like circumstances - and is adjudged to be negligent if it

falls below the standard. One should properly talk, therefore, of "proving facts which will lead to a finding of negligence". One's perception of the legal meaning of negligence will shape one's decision as to the important facts or particulars.

More particularly this chapter is concerned with "the proof of negligence".

METROPOLITAN RAILWAY COMPANY v. JACKSON

House of Lords (1877) 3 App. Cas. 193

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case an action was brought by the Respondent against the *Metropolitan Railway Company* for negligence in not carrying the Respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the Appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord *Coleridge*, Mr. Justice *Brett*, and Mr. Justice *Grove*, were of opinion that there was such evidence. The Court of Appeal was equally divided; the Lord Chief Justice and Lord Justice of Appeal *Amphlett* holding that there was evidence, the Lord Chief Baron and Lord Justice of Appeal *Bramwell* holding that there was not.

The facts of the case are very short. The Respondent in the evening of the 18th of July, 1872, took a third-class ticket from *Moorgate Street* to *Westbourne Park*, and got into a third-class compartment; the compartment was gradually filled up, and when it left *King's Cross* all the seats were occupied. At *Gower Street Station* three persons got in and were obliged to stand up. There was no evidence to shew that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the Respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at *Gower Street*.

At *Portland Road*, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was no evidence to shew by whom either act was done. Just as the train was starting from *Portland Road* there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The Respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the Respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the Respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury found a verdict for the Respondent with £50 damages. There was not, at your Lordships' bar, any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been